

FISH & RICHARDSON P.C.

Frederick P. Fish
1855-1930

W.K. Richardson
1859-1951

November 27, 2007

VIA ECF

The Honorable Sue L. Robinson
United States District Court
for the District of Delaware
844 King Street
Wilmington, DE 19801

Re: *Callaway Golf Company v. Acushnet Company*
USDC-D. Del. - C. A. No. 06-91 (SLR)

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Dear Judge Robinson:



ATLANTA

AUSTIN

BOSTON

DALLAS

DELAWARE

NEW YORK

SAN DIEGO

SILICON VALLEY

TWIN CITIES

WASHINGTON, DC

Callaway Golf submits this letter in response to Acushnet's letter of November 24 (D.I. 352), in which Acushnet addressed Callaway Golf's motion *in limine* regarding Acushnet's non-prior art "hybrid" golf balls and urged reconsideration of Acushnet's motion for summary judgment of invalidity regarding the '130 patent.

Inadmissibility of the Hybrid Golf Balls

Despite the Court's recognition that the hybrid balls "do not represent any embodiment of any prior art reference" (D.I. 347 at 16), Acushnet's letter brief persists in referring to these creations as "prior art balls." (D.I. 352 at 1-2.) Acushnet's continued use of this misnomer further illustrates why these balls should be excluded from evidence – at trial, Acushnet's presentation of these balls will mislead the jury into believing that the balls are genuine prior art, or representative of genuine prior art, which they clearly are not.

As the Court has acknowledged, the hybrid golf balls were created and tested by Acushnet's employees and attorneys, not by its testifying expert, Dr. Statz, or its now-excluded expert, Dr. MacKnight. (*See* D.I. 346 at 2.) The Court excluded Dr. MacKnight's testimony regarding the hybrid balls because his involvement with their manufacture and testing was, at best, attenuated. Although Acushnet has suggested that Dr. Statz can provide the "evidentiary predicate" for the admission of these balls (D.I. 352 at 1-2), Dr. Statz is not capable of establishing either the relevance or the reliability of the hybrid balls, much less their testing.

In suggesting that Dr. Statz "opines as to the relevance of these prior art golf balls" (*id.* at 3), Acushnet mistakenly provides an expansive view of Dr. Statz's expert report. The only places where Dr. Statz even mentions the hybrid balls are the paragraphs in which he merely cites the Shore D hardnesses measured for those balls, and summarily concludes that those measurements support a finding of obviousness. (*E.g. id.*, Ex. 1, at ¶¶ 78, 84, 93, 102, 106, 113). Dr. Statz's report is devoid of any details regarding how or why the hybrid golf balls were conceived of, made, or tested.

FISH & RICHARDSON P.C.

The Honorable Sue L. Robinson
November 27, 2007
Page 2

In his deposition, Dr. Statz confirmed that he had nothing to do with the particular manufacturing specifications and processes by which the hybrid balls were made. In fact, he conceded the balls had been made before he ever became involved with this litigation. (Statz Depo. Tr., Ex. A at 220:23-221:6.) Among other things, Dr. Statz testified that he had no knowledge of why certain thicknesses were selected for the cover layers of the hybrid balls. (*Id.* at 432:16-20.)

Because Dr. Statz's report says nothing about the actual hybrid balls apart from citing the bare test results, Acushnet has attempted to argue that Dr. Statz's general discussions of what the prior art discloses, and the ways in which these references might be combined, provide a foundation for admitting the particular hybrid golf balls created by Acushnet's attorneys and employees. (D.I. 352 at 2-3.) As the Court has recognized, however, the particular design and construction choices embodied in the hybrid balls are not disclosed in any prior art reference, nor are they the inevitable result when multiple references are combined. (D.I. 347 at 16 and n.18.) In this case, the insight and motivation required to transform the disparate disclosures of the prior art into the golf balls at issue came not from Dr. Statz, Dr. MacKnight, Mr. Dalton, or any other potential witness, but from Acushnet's trial counsel:

- Q. Paragraph 10, you say, "I directed the preparation of three inner cover layer materials." Who selected those materials?
- A. The attorneys.
- Q. Similarly, let's turn to page 5, Paragraph 13 where you say, "I directed the preparation of three outer cover layer materials." Who selected those materials?
- A. The attorneys.
- Q. So the selection of the core materials, inner cover materials and outer cover materials in the golf balls you made were all made by attorneys, correct?
- A. Correct.
- Q. Those were the attorneys at the Howrey law firm?
- A. Correct. That would be specifically Mr. Rosenthal.

(MacKnight Depo. Tr., Ex. B at 52:20-53:12.) Thus, it appears that Mr. Rosenthal, one of Acushnet's trial lawyers, would be the only witness capable of explaining the thought processes involved in creating the particular hybrid golf balls Acushnet seeks to use. Needless to say, it would be highly irregular if Mr. Rosenthal were to provide any testimony to the jury – much less testimony regarding the motivations driving one of ordinary skill in the art regarding the manufacture of the hybrid golf balls.

Moreover, the critical role Acushnet's trial counsel played in the creation of the hybrid golf balls undermines Dr. Statz's ability to rely on those balls to reach his

FISH & RICHARDSON P.C.

The Honorable Sue L. Robinson
 November 27, 2007
 Page 3

conclusions on invalidity. Evidence created by counsel for the purposes of winning a lawsuit cannot qualify under Fed. R. Evid. 703 as the basis for an expert opinion, as it cannot possibly be considered “of a type reasonably relied upon by experts in the particular field.” As this Court has previously held, alleged recreations of prior art cannot provide the basis for expert testimony on invalidity when those recreations depart from the embodiments actually disclosed in the prior art. *Wesley Jessen Corp. v. Bausch & Lomb, Inc.*, 209 F. Supp. 2d 348, 393 (D. Del. 2002).

Finally, the Court has acknowledged that, regardless of whatever hardness properties the hybrid balls may exhibit, those properties are irrelevant to Acushnet’s obviousness defenses unless Acushnet can establish that a person of ordinary skill in the art in 1995 would have known that the various prior art combinations would actually yield a golf ball with an outer-cover Shore D hardness of 64 or less. (D.I. 347 at 20-21, *citing In re Rijckaert*, 9 F.3d 1531, 1534 (Fed. Cir. 1993).) The hybrid balls themselves clearly cannot show what a person of ordinary skill in the art in 1995 would have known, since those balls did not exist until Acushnet’s attorneys generated them in 2007.¹ To the extent Dr. Statz could possibly testify about what a person of ordinary skill in the art may have known or expected in 1995, he can (and must) do so without reference to the hybrid golf balls.

In summary, neither Dr. Statz nor any other Acushnet witness can lay a sufficient foundation for admitting the hybrid balls into evidence. Even if the hybrid balls were otherwise admissible, their relevance – if any – would be far outweighed by the prejudice Callaway Golf would suffer from the likelihood that the jury would misconstrue the hybrid balls as genuine prior art.

Reconsideration of Denial of Summary Judgment re ’130 Claims 1 and 2

In an effort to pare down the number of patent claims presented at trial, Callaway Golf has elected to present only one claim, claim 5, from the ’130 patent.² This election should moot Acushnet’s request for reconsideration of the Court’s denial of summary judgment regarding ’130 claims 1 and 2. Nevertheless, and setting aside

¹ Acushnet has previously argued to the Court that a person of skill in the art would have known the hardness of the hybrid balls by making them and testing them. (*See* D.I. 297 at 1, 10.) Under this argument (which does not appear in Dr. Statz’s expert report), the hardnesses of the hybrid balls would *not* have been known in 1995, since, at that time, no one had ever made any of those balls.

² The other claims Callaway Golf has elected to present at trial are claims 1, 4, and 5 of the ’293 patent; claims 1-3 of the ’156 patent; and claims 1 and 3 of the ’873 patent.

FISH & RICHARDSON P.C.

The Honorable Sue L. Robinson
November 27, 2007
Page 4

the procedural improprieties of Acushnet's request for reconsideration, Callaway Golf observes that the Court's ruling should stand for at least the following two reasons.

First, the Court predicated its denial of summary judgment regarding '130 claims 1 and 2 in part on its refusal to give effect to the surprise declaration of James Proudfit. (D.I. 347 at 18.) Although the parties were able to later arrange for Mr. Proudfit's deposition, that does not alter the fact that Acushnet failed to disclose this witness in a timely fashion to allow for full discovery.³ Thus, Acushnet's proffer of Mr. Proudfit's affidavit was properly declined, and, without this support, Acushnet's request for summary judgment was properly denied.

Second, the Court also based its denial of summary judgment on Acushnet's failure to present sufficient evidence regarding the on-the-ball Shore D hardness of the outer cover of the Wilson Ultra Tour Balata. (D.I. 347 at 18-19.) Acushnet's letter of November 24th nowhere contests this independent basis for the denial of its motion.

Respectfully,

/s/ Thomas L. Halkowski

Thomas L. Halkowski

TLH:sb

Attachments

cc Clerk of Court (via hand delivery)
Counsel of record (via ECF & e-mail)

80052108.doc

³ Acushnet notes that it disclosed Mr. Proudfit on August 31, 2007. (D.I. 352 at 4.) However, Acushnet disclosed Mr. Proudfit as a witness only after it filed his declaration with its summary judgment opposition (D.I. 238 at Ex. 5) on August 20, 2007.

Exhibit A

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CALLAWAY GOLF COMPANY,

Plaintiff,

V.

C.A. No. 06-91 (SLR)

ACUSHNET COMPANY,

Defendant.

10

11

12

Tuesday, July 31, 2007

14 VIDEOTAPED DEPOSITION of Nonparty Expert
15 Witness DR. ROBERT J. STATZ, Volume 1, taken by
16 Plaintiff, pursuant to agreement, held at the
17 offices of Fish & Richardson, P.C., 919 North
18 Market Street, Wilmington, Delaware, before Amy
19 E. Sikora, CRR, CSR, RPR, CLR, Certified Realtime
20 Reporter, Certified Shorthand Reporter, Registered
21 Professional Reporter, Certified LiveNote Reporter,
22 and Notary Public within and for the State of New York.
23 JOB No. 69923

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12 HOWREY LLP

13 Attorneys for Defendant

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16 BY: BRIAN A. ROSENTHAL, ESQ.

17

18 ALSO PRESENT:

19 THOMAS DELVECCHIO, Videographer

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Page 219

1 That's controlled by how you mold it.

2 Q. Okay. If I misspoke, I'm sorry.

3 But my question is, can you
4 predict the hardness of a golf ball layer by
5 knowing the hardness -- the Shore hardness of
6 the same material on a plaque?

7 MR. ROSENTHAL: Objection.

8 Go ahead.

9 A. Within reason, yes. Soft a
10 materials give you soft covers. That's what
11 we've been doing.

12 Q. I don't mean qualitatively soft
13 or hard, I mean the number.

14 A. You'd have to look at
15 MacKnight's data to see exactly. Because I
16 never did a, you know, side-by-side
17 comparison of plaque hardness and ball
18 hardness with different cover thicknesses.

19 Q. So do you have an opinion one
20 way or the other whether it's possible to
21 predict the hardness of a cover layer of a
22 golf ball based on the hardness -- knowing
23 the hardness of the material on a plaque?

24 MR. ROSENTHAL: Objection.

25 Incomplete hypothetical.

Page 220

1 A. I just thought I answered that
2 question. If you specify the thickness of
3 the material and how you put it on, yes, it
4 can be predicted, within, you know, a
5 reasonable range.

6 Q. Did -- did Dr. MacKnight do that
7 before he made his balls? Did he predict
8 what the hardnesses would be?

9 A. I don't know. I've never talked
10 to Bill. I can't say I never talked to him.
11 I talked to him 30 years ago at an ionomer
12 conference, but not since then.

13 Q. Okay.

14 A. Actually, would be an
15 interesting question to ask him.

16 Q. Did you predict what the
17 hardnesses of the MacKnight balls would be
18 before they were made?

19 A. No. MacKnight made the balls
20 before I was involved with this, so I didn't
21 know what he was doing until Brian showed me
22 the data.

23 Q. Okay. So you didn't ask
24 Dr. MacKnight to make any particular golf
25 balls?

Page 221

1 A. No.

2 Q. You weren't involved in the
3 process of deciding what --

4 A. No.

5 Q. -- he made?

6 A. No, not at all.

7 Q. Was it ever explained to you
8 what he did or why he did it?

9 A. Oh, yes. There is a write-up.
10 And I understand what he did and why he did
11 it.

12 Q. Okay. Apart from his report,
13 which obviously we can read, did anyone ever
14 explain to you orally why Dr. MacKnight made
15 the selections he did and what actually he
16 asked to be done?

17 A. Not until I talked to Brian.

18 Q. What did Mr. Rosenthal tell you?

19 A. That Bill made these examples to
20 measure the hardness on golf balls with
21 compositions that were related to what's in
22 the patent.

23 Q. Do you know who made the
24 selection of what --

25 A. No.

Page 222

1 Q. -- combinations were used to
2 make the balls?

3 A. No, I don't. That was done
4 before I was involved.

5 Q. When you say it was done before
6 you were involved, you mean before you were
7 even contacted to work on the case?

8 A. I don't know that.

9 Q. Okay. When were you first
10 presented with Dr. MacKnight's results?

11 A. Three, four weeks ago.

12 Q. Well, sometime before you --
13 obviously before you filed your expert
14 report; right?

15 A. Yes, I guess. I've been
16 traveling since Brian and I did the expert
17 report. I've been to Alaska and I've been to
18 Colorado for a week, so --

19 Q. Okay.

20 A. -- could be a little bit mixed
21 up as to the time schedule here.

22 Q. Okay. Your report is dated
23 June 1, 2007. I'll just represent that to
24 you. So can you estimate for me how long in
25 advance of that date you first became aware

Page 291

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF DELAWARE

3

4 CALLAWAY GOLF COMPANY,

5 Plaintiff,

6 v. C.A. No. 06-91 (SLR)

7 ACUSHNET COMPANY,

8 Defendant.

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Wednesday, August 1, 2007

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CONTINUED VIDEOTAPED DEPOSITION of Nonparty Expert Witness DR. ROBERT J. STATZ, Volume 2, taken by Plaintiff, pursuant to agreement, held at the offices of Fish & Richardson P.C., 919 North Market Street, Wilmington, Delaware, before Amy E. Sikora, CRR, CSR, RPR, CLR, Certified Realtime Reporter, Certified Shorthand Reporter, Registered Professional Reporter, Certified LiveNote Reporter, and Notary Public within and for the State of New York.

JOB No. 69924

Page 292

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16 BY: BRIAN A. ROSENTHAL, ESQ.
17
18 ALSO PRESENT:
19 THOMAS DELVECCHIO, Videographer
20
21
22
23
24
25

Page 431

1 A. Well, you can base it on the
2 table. You can base it on Mike Sullivan's
3 data in some of his patents. If you look
4 very carefully, he'll give plaque hardness
5 and then he'll give hardness on a ball, and
6 he'll give C and D mixed together. Go
7 through and look at those, and you'll find
8 that a 72C is definitely less than a 64.

9 Q. All right. Let's not cover old
10 ground. Let's move on.

11 A. Okay. Well, I mean, when I did
12 this it wasn't old ground. Okay. Okay. I
13 didn't have any comments for a few pages
14 here. I must have been tired. Not to say
15 that if I were fresh I couldn't find some
16 more comments.

17 Okay. Criticizes MacKnight's
18 experiments several times. I think one of
19 the things he pointed out was that the inner
20 layer thickness picked by MacKnight to
21 demonstrate the hardness of the outer cover
22 was the wrong thickness, but if you look in
23 Sullivan's patents, when he did the Nesbitt
24 ball as prior art, he picked just about the
25 same thickness of the inner layer. Do you

Page 432

1 want to look at that?

2 Q. No. I understand. I understand
3 the comments.

4 A. I mean, you have to make a
5 choice, otherwise you're there 'til the cows
6 come home.

7 Q. Because most of the prior
8 references, including Nesbitt, disclose a
9 range for the layers; right?

10 A. Right, right. A very broad
11 range. And so you pick out a -- Mike picked
12 out around 50 to 60 mil. thickness as the
13 inner layer, and so did MacKnight. So was
14 MacKnight's choice wrong? I don't think so.
15 It was a good -- good starting point.

16 Q. Do you know why Dr. MacKnight
17 made the choices he made as to thicknesses
18 and so forth?

19 A. No. I wasn't party to the
20 experiments that were done.

21 Q. Right. Okay. Continue, please.

22 A. We talked about Proudfit's
23 examples. Think we've talked about that
24 enough. I mean, Proudfit's ball was
25 definitely a soft covered ball over a hard,

DR. ROBERT J. STATZ
VOLUME 2

08/01/07

Page 433

1 stiff mantle, over a cross-linked
2 polybutadiene core.

(Discussion off the record.)

A. Okay. Okay. There was a mark I made on page 29. "Proudfit's disclosure of balata outer cover does not inherently disclose an outer cover Shore D hardness."

You can make Proudfoot's composition, and you can measure the Shore D hardness. The Shore D hardness is less than 64.

Q. How do you know what Proudfoot's composition was?

A. I think it's in Proudfoot's patent, and I think MacKnight did that.

Q. For the outer cover layer?

A. Yes.

Q. Okay.

A. Okay, all right. Okay. Okay.

This is interesting. You're at 193. "I also believe that a person of ordinary skill in the art would not have any way of experimentally determining the acid content of any ionomer or ionomers in the mantle of the Ultra Tour balata ball." Okay.

Exhibit B

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE
3
4 CALLAWAY GOLF COMPANY,
5 Plaintiff,
6 VS C.A. No. 06-91(SLR)
7 ACUSHNET COMPANY,
8 Defendant.

9
10
11
12 -----
13
14 VIDEOTAPED DEPOSITION OF WILLIAM J. MacKNIGHT
15 Boston, Massachusetts
16 Thursday, August 2, 2007

17
18
19
20 Court Reporter:

21 Loretta Hennessey

22 RDR, CRR

23 JOB No. 69926

24

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Page 2

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20 ALSO PRESENT: Jason Lachapelle, Videographer

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22

23

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Page 51

1 A. It started back in the early 1980s.

2 Q. Okay. So it's probably not the same case I'm
3 thinking of --

4 A. Probably not.

5 Q. -- that wound up in '96?

6 A. I don't think so, but I don't know.

7 MR. BRANNON: I think it's the '90
8 settlement agreement; it was a 1990 settlement
9 agreement.

10 MR. SHUMAN: Okay. That helps.

11 Q. What was your role, Dr. MacKnight, in the
12 Acushnet/Spaulding litigation over the Molitor
13 blended ionomer patent?

14 A. I was retained as an expert.

15 Q. By Acushnet?

16 A. By Acushnet.

17 Q. Do you recall the general topic of your
18 testimony?

19 A. I didn't testify in that case.

20 Q. Were you deposed in that case?

21 A. I was not.

22 Q. Did you give an expert report in that case?

23 A. I gave an affidavit.

24 Q. Declaration?

25 A. I suppose -- I frankly don't understand what

Page 52

1 the legal terms mean.

2 Q. I've always used them interchangeably.

3 A. Okay. Then that would be correct.

4 Q. Okay. Do you remember what the substance of
5 your affidavit was?

6 A. Honestly, I don't, but it had to do with an
7 identical composition of matter arrived at by
8 preparing ionomer blends in different ways.
9 Let's put it -- that's vague, but, I'm sorry,
10 that's the best I can do.

11 Q. I understand. It's kind of a long time ago.

12 Oh, before I go on, have you ever
13 met or spoken to Terry Melvin?

14 A. No.

15 Q. Okay. Well, then, I don't need to ask any more
16 questions about him.

17 Let's go back to your declaration,
18 paragraph 10 on Page 4.

19 A. Yes.

20 Q. Paragraph 10, you say, "I directed the
21 preparation of three inner cover layer
22 materials." Who selected those materials?

23 A. The attorneys.

24 Q. Similarly, let's turn to page 5, Paragraph 13
25 where you say, "I directed the preparation of

Page 53

1 three outer cover layer materials." Who
2 selected those materials?

3 A. The attorneys.

4 Q. So the selection of the core materials, inner
5 cover materials and outer cover materials in
6 the golf balls you made were all made by
7 attorneys, correct?

8 A. Correct.

9 Q. Those were the attorneys at the Howrey law
10 firm?

11 A. Correct. That would be specifically Mr.
12 Rosenthal.

13 Q. Given that Mr. Rosenthal selected the materials
14 for the core and cover layers of these golf
15 balls, what was your responsibility related to
16 the creation and testing of these golf balls?

17 A. My responsibility was to see that the testing
18 was carried out properly and that true
19 experimental results were obtained from it.

20 Q. Did you direct in any way the selection of
21 materials or manner of construction for these
22 golf balls?

23 A. We discussed some of that before. I was
24 certainly consulted about some of the issues
25 involved, and that's what I can say.

Page 54

1 Q. And you testified that other than the Papi 94
2 issue, you were not otherwise consulted about
3 how to construct the golf balls?

4 MR. BRANNON: Objection,
5 mischaracterizes.

6 A. The injection molding issue, for example.

7 Q. That's correct.

8 A. Another issue --

9 Q. Other than the Papi 94 and injection molding
10 issue, were there any other ways --

11 A. Yes.

12 Q. -- in which you were consulted about the
13 construction of the golf balls?

14 A. Yes, whether they should be painted or not.

15 Q. Did you make a decision on that issue?

16 A. I had an input on that issue.

17 Q. What was your input?

18 A. I decided that it should, in my opinion.

19 Q. Why?

20 A. Because I thought, and this is based on limited
21 knowledge, that we wanted to make as realistic
22 a golf ball as we could.

23 Q. Were there any other ways in which you
24 contributed input as to how the golf balls were
25 to be created?

Page 55

1 A. I don't recall, other than what I said earlier.

2 Q. Okay. So as you recall it now, the three ways
3 you've mentioned you contributed to the
4 construction of these golf balls were deciding
5 whether or not they should be painted, whether
6 to use injection molding versus compression
7 molding, and what to do about the use of Papi
8 94, correct?

9 A. Those are three specific ones I recall. There
10 probably are others.

11 Q. Okay. But you don't recall any other ways you
12 were consulted about how to construct these
13 balls?

14 A. Not as I sit here, no.

15 Q. Okay.

16 A. Well, I'll revise that. I was consulted about
17 conditioning after they were made, but that's
18 later, that's post.

19 Q. When you say "conditioning," what do you mean?

20 A. Well, as is well known, and this has to do with
21 materials, not golf balls, particularly, but
22 so-called semi-crystalline polymer materials,
23 which a lot of these fall into that category,
24 can change properties over time, over long
25 periods of time because of the changes in the